Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v Sri Komakmur Sdn Bhd (No 2)

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-307 OF 1996
KAMALANATHAN RATNAM JC
14 JANUARY 1998

Civil Procedure *— Contempt of court — Order of committal, application for — Service of order of court — Whether service on solicitors was proper service — Rules of the High Court 1980 O 45 r 7(3)(a)*

Civil Procedure *— Contempt of court — Order of committal, application for — Failure to indorse penal notice on order served — Whether mandatory requirement to indorse punitive sanction on the order — Whether requirement for penal notice will only apply where the judgment or order on which the committal proceedings are launched, is a positive order — Rules of the High Court 1980 O 45 r 7(4)(b)*

The plaintiff applied for leave to commit one Lim Soon Peng, a director of the defendant ('the director') for failure to comply with an order of the court ('the order') to specifically perform a contract to remove squatters from a particular area within 30 days from the date of the order. On the hearing of the notice of motion, counsel for the director — in reliance on O 45 r 7(3)(a) and sub-r (4)(b) of the Rules of the High Court 1980 ('the RHC') — raised two preliminary issues, ie: (a) the order was not served on the director; and (b) the order failed to have indorsed on it a penal notice pursuant to the RHC. In response, counsel for the applicant argued, in relation to the issue of service, that the service of the order on the solicitors for the director was sufficient. With regard to the issue of the need to indorse the penal notice on the order, counsel argued that such an indorsement is only necessary if the defendant is unrepresented.

Held, dismissing the notice of motion with costs:

(1) Once a defendant is represented by a firm of solicitors who have filed a memorandum of appearance with the court and had served a copy of same on the plaintiff's solicitors, it must stand that until the solicitors for the defendant discharge themselves or are themselves discharged by their client and such notice being given to the plaintiff, the firm of solicitors shall continue to remain as having conduct of the case. When a defendant company breaches an order and is in contempt, it can only meet a charge of contempt through its directors. The service on the firm of solicitors in this case was proper service. In this case, the affidavit evidence clearly showed service of the order on the solicitors. Therefore, the director had been properly served with the order (see pp 760G–I and 761B); *Wee Choo Keong v MBf Holdings Bhd & Anor* [1995] 3 MLJ 549 followed; *Capital Insurance Bhd v BS Sidhu* [1996] 3 MLJ 1 distinguished.

(2) There is a clear distinction between a body corporate or an individual, having to do an act, and abstaining from doing an act. The requirement for a penal notice will only apply where the judgment or order on which the committal proceedings are launched is a positive order in the sense that it requires a person to do some act. On the other hand, where the order is prohibitory, that is, where the order directs a defendant not to do an act, the absence of the penal notice in the order is not fatal so long as the court is satisfied that the party restrained has notice. In this case, the defendant was required to specifically perform the contract within 30 days to remove the squatters. Clearly, the mandatory requirement of the need to indorse the punitive sanction in the order has to be complied with (see pp 761I and 762A–B).

[Bahasa Malaysia summary

Plaintif telah memohon kebenaran untuk 'commit' seorang bernama Lim Soon Peng, seorang pengarah defendan ('pengarah tersebut') kerana gagal mematuhi satu perintah mahkamah ('perintah tersebut') untuk melaksana secara khusus suatu kontrak untuk memindah setinggan daripada suatu kawasan tertentu dalam tempoh 30 hari dari tarikh perintah tersebut. Di pembicaraan notis usul, peguam pengarah tersebut — dengan bergantung pada A 45 k 7(3)(a) dan sub-k (4)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') — membangkitkan dua isu permulaan, iaitu: (a) perintah tersebut tidak disampaikan kepada pengarah tersebut; dan (b) perintah tersebut tidak diendorskan dengan suatu notis penal menurut KMT. Dalam jawapan, peguam pemohon berhujah, berkaitan dengan isu penyampaian, bahawa penyampaian perintah tersebut kepada peguamcara pengarah tersebut adalah memadai. Mengenai isu atas keperluan untuk mengendors notis penal atas perintah tersebut, peguam menghujahkan bahawa pengendorsan sedemikian hanya perlu sekiranya defendan tidak diwakili.

Diputuskan, menolak notis usul dengan kos:

(1) Sebaik saja defendan diwakili oleh sebuah firma peguamcara yang telah memfailkan memorandum kehadiran dengan mahkamah dan telah menyampaikan sesalinan kepada peguamcara plaintif, ia mesti kekal bahawa sehingga peguamcara defendan dilepaskan secara sendiri atau mereka sendiri dilepaskan oleh klien mereka dan notis sedemikian telah diberikan kepada plaintif, firma peguamcara akan terus mengendalikan kes. Di mana sebuah syarikat defendan memungkiri perintah dan menghina, ia hanya boleh memenuhi pertuduhan penghinaan menerusi pengarah-pengarahnya. Penyampaian kepada firma dalam kes ini adalah penyampaian yang wajar. Dalam kes ini, keterangan afidavit jelas menunjukkan penyampaian perintah tersebut kepada peguamcara. Maka, perintah tersebut telah

disampaikan dengan betul kepada pengarah tersebut (lihat ms 760G–I dan 761B); *Wee Choo Keong v MBf Holdings Bhd & Anor* [1995] 3 MLJ 549 diikut; *Capital Insurance Bhd v BS Sidhu* [1996] 3 MLJ 1 dibeza.

(2) Terdapat perbezaan yang nyata di antara sebuah pertubuhan perbadanan atau seorang individu yang harus membuat sesuatu, dan menahan diri daripada membuat sesuatu. Keperluan untuk satu notis penal hanya akan terpakai di mana penghakiman atau perintah atas mana prosiding penghinaan didasarkan adalah perintah positif dalam ertikata bahawa ia menghendaki seseorang melakukan sesuatu. Sebaliknya, di mana perintah melarang, iaitu, di mana perintah mengarah defendan supaya tidak melakukan sesuatu, ketiadaan notis penal dalam perintah tidak padah asalkan mahkamah berpuas hati bahawa pihak yang ditahan diberi notis. Dalam kes ini, defendan dikehendaki melaksanakan kontrak itu secara khusus dalam tempoh 30 hari untuk memindah setinggan-setinggan. Jelas, keperluan mandatori tentang keperluan untuk mengindors sanksi punitif dalam perintah tersebut harus dipatuhi (lihat ms 761I dan 762A–B).]

Notes

For cases on contempt of court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 788–837.

Cases referred to

Allport Alfred James v Wong Soon Lan [1989] 1 MLJ 338 (refd)
Capital Insurance Bhd v BS Sidhu [1996] 3 MLJ 1 (distd)
Class One Video Distributors Sdn Bhd & Anor v Chanan Singh Sher Singh & Anor [1997] 3 CLJ 694 (refd)
Leow Seng Huat v Low Mui Yein [1996] 3 AMR 3388 (refd)
Wee Choo Keong v MBf Holdings Bhd & Anor [1995] 3 MLJ 549 (folld)

Legislation referred to

Rules of the High Court 1980 O 45 rr 5(1), (7), 7(3)(a), (4)(b), O 62 r 13, Form 87

J Doshi (*Abdullah & Zainudin*) for the plaintiff.
Paul Kwong (*Azman Davidson & Co*) for the defendant.

Kamalanathan Ratnam JC: On 27 February 1997, I granted the plaintiff herein specific performance of an agreement entered into between the plaintiff and the defendant read together with a letter of undertaking and a further order that the defendant do within 30 days from the date of the said order remove the squatters/occupiers from Area 6 (including one Abdul Malek bin Ishak) and from the Main Drain Reserve as shown in Sch C attached to the said agreement, and I also ordered damages to be assessed by the deputy registrar with costs to the plaintiff.

As a result of the defendant's failure to comply with the said order, the plaintiff applied for leave to commit one Lim Soon Peng, a director of the defendant. Having obtained leave on 12 September 1997, the plaintiff then filed a notice of motion (encl 25) for an order for committal.

Preliminary objections

On the hearing of the notice of motion, Mr Paul Kwong for the director raised two preliminary issues. Since parties agreed that they were prepared to argue on the two issues, I heard arguments. Taking both the objections together, Mr Paul Kwong pointed out that: (a) the order dated 27 February 1997 was not served on the said director; and (b) the order itself failed to have indorsed on it a penal notice pursuant to the rules. He relied on O 45 r 7(3)(a) and sub-r (4)(b) of the Rules of the High Court 1980 ('the RHC'). It is relevant to reproduce the said sub-rules.

Order 45 r 7(3)(a) reads as follows:

> Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5 (1)(ii) or (iii) unless —
>
> (a) a copy of the order has also been served personally on the officer against whose property leave is sought to issue a writ of seizure and sale or against whom an order of committal is sought; ... .

Order 45 r 7(4)(b) reads as follows:

> There must be indorsed on the copy of an order served under this rule a notice in Form 87 informing the person on whom the copy is served — ...
>
> (b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it.

Court's findings

Mr Paul Kwong referred me to *Capital Insurance Bhd v BS Sidhu* [1996] 3MLJ 1 where the Court of Appeal held that although the respondent was present in court and heard the said order, under O 45 r 5(1) and (7) of the RHC, the respondent must be served with the order personally. Only then can he be said to have wilfully disobeyed the order. The court held that in contempt proceedings which affect the liberty of the subject, before such a court order can be enforced, there must be strict compliance with the relevant rules which relate to service of the order on the respondent. It did not matter that the respondent was, in those proceedings, the counsel who was present in court.

On the issue of the need to indorse the penal notice on the said order dated 27 February 1997, the plaintiff relied on *Class One Video Distributors Sdn Bhd & Anor v Chanan Singh Sher Singh & Anor* [1997] 3 CLJ 694 where Haidar J, in dealing with an individual and not a corporate body, held that pursuant to O 45 r 7(4), the penal notice must be indorsed on the

copy of the order 'served under this rule' and that service under this rule meant personal service. Once these two requirements are complied with, he held that the order may be enforced by an order of committal under O 45 r 5. In effect, he followed the decision of Chao Hick Tin JC (as he then was) in *Allport Alfred James v Wong Soon Lan* [1989] 1 MLJ 338. The learned judicial commissioner there held that for a mandatory injunction, personal service must be effected before enforcement may be taken and he further held that there was no excuse for the non-compliance of the requirement of the indorsement of a penal notice. The same strict conservative approach was adopted by Mohd Hishamudin J in *Leow Seng Huat v Low Mui Yein* [1996] 3 AMR 3388.

In response, Ms Doshi for the applicant argued, in relation to the issue of service, that the service of the order on the solicitors for the director was sufficient. She referred me to encl 2 which was the memorandum of appearance filed by the defendant's solicitors. In *Wee Choo Keong v MBf Holdings Bhd & Anor* [1995] 3 MLJ 549, the respondents alleged that despite the fact that the court order had been served or was deemed to have been served on the first appellant, he continued to breach the said order. The first appellant on the other hand, in his affidavit, affirmed that he was not evading service and contended that the court order had to be personally served. The then Supreme Court held that the first appellant's own firm which was acting as his solicitors was duty-bound to accept service under O 62 r 13 of the RHC which reads:

> Where a party after having sued or appeared in person has given notice in writing to the opposite party or his solicitor, through a solicitor, that such solicitor is authorized to act in the cause or matter on his behalf, all writs, notices, pleadings, summonses, orders, warrants, and other documents, proceedings, and written communications which ought to be delivered to or served upon the party on whose behalf the notice is given shall thereafter be delivered to or served upon such solicitor.

To my mind, this stands to reason. Once a defendant is represented by a firm of solicitors who have filed a memorandum of appearance with the court and had served a copy of same on the plaintiff's solicitors, it must stand that until the said solicitors for the defendant discharge themselves or are themselves discharged by their client and such notice being given to the plaintiff, the firm of solicitors shall continue to remain as having conduct of the case. When a defendant company breaches an order and is in contempt, it can only meet a charge of contempt through its directors. In such circumstances, the plaintiff, like in this case, will be hard put to trace the whereabouts of the directors to effect personal service. It is no doubt with this in mind that the (then) Supreme Court has approved service of the order, which would form the basis for an order for committal, upon the solicitors. I am bound by this decision and therefore accept the service on the firm of solicitors in this case as proper service. In *BS Sidhu* relied on by Mr Paul Kwong, there was no service of the order at all on BS Sidhu. The mere fact that he was present in court when the order was made was insufficient to satisfy the condition requiring service. However, in this case, affidavit evidence clearly shows service of the order on Messrs Azman Davidson & Co.

A In fact, the solicitors for the defendant even filed an application for stay of execution and the director who affirmed the affidavit was none other than the said Lim Soon Peng who affirmed an affidavit in support of the application and confirmed receipt of the order dated 27 February 1997. This application was even complemented with a certificate of urgency. A perusal of all the affidavits show that Lim Soon Peng is the director who B has affirmed the affidavits on behalf of the defendant. I am therefore satisfied that the said Lim Soon Peng has been properly served with the order dated 27 February 1997.

With regard to the issue of the need to indorse the penal notice on the order, Ms Doshi argued that such an indorsement is only necessary if the C defendant is unrepresented. The plaintiff too relied on *Class One Video* where at p 700H, Haidar J said:

> In this case though the order was not personally served on the second defendant, I am satisfied that the second defendant having had the benefits of counsel's advice, is deemed to know of the terms of the order.

D In that case, the order was not even extracted and the court allowed the proceedings to continue. Further, even the penal notice was not indorsed in the draft order.

I am of the view that counsel for the plaintiff has missed the point. Pursuant to O 45 r 7(3)(b), an order requiring a body corporate *to do an* E *act* shall not be enforced unless the copy has been so served before the expiration of the time within which the body was required to do the act. Sub-rule (4) says that there must be an indorsement on the copy of an order served under this rule, that is a notice in Form 87 informing the person on whom the copy is served as and is required by sub-r 4(b) that if F the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it. These are mandatory requirements, a breach of which will render any application to commit, impotent.

G Pursuant to sub-r (5), the copy of the order required to be served under this rule must be served on the person required to do the act. However, pursuant to sub-r (6) where the person to be served with the order is required *to abstain from doing an act*, he need not be served personally with the order nor need there be a penal notice indorsed on the order provided the court is satisfied that he has notice of the order either H by being present when the order was made or by being notified of the terms of the order, whether by telephone, telegram or otherwise.

There is a clear distinction between a body corporate or an individual, having to do an act, and abstaining from doing an act. In the case before me, the defendant was required to specifically perform the contract within I 30 days to remove the squatters. Clearly, the mandatory requirement of the need to indorse the punitive sanction in the order has to be complied with. The reason is obvious. If a party is required to do an act, he has to exert energy and time and effort to comply with the order. The reality of punitive sanctions being imposed will no doubt jolt the recalcitrant to immediate action and it is with this in mind that the indorsement of

punitive sanction becomes a mandatory requirement. It is my judgment that the requirement for a penal notice will only apply where the judgment or order on which the committal proceedings are launched, is a positive order in the sense that it requires a person to do some act. On the other hand, where the order is prohibitory, that is, where the order directs a defendant not to do an act, the absence of the penal notice in the order is not fatal so long as the court is satisfied that the party restrained has notice.

Since the plaintiff has failed on the second issue, I hereby dismiss the notice of motion with costs.

Notice of motion dismissed.

Reported by Loo Lai Mee